

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT
U.S. DISTRICT COURT OF WASHINGTON
AT SEATTLE

ROBERT TURNER,

Plaintiff,

v.

Officer NICHOLAS HOGAN; Officer
JOHN DOE; Former Chief of Police
DAVID HAYNES, and THE CITY OF
TUKWILA and its POLICE
DEPARTMENT,

Defendants.

No. 2:14-cv-00675-RSL

OPPOSITION TO PLAINTIFF'S
MOTION TO AMEND HIS
COMPLAINT BY DEFENDANTS CITY
OF TUKWILA AND DAVID HAYNES

I. INTRODUCTION AND RELIEF REQUESTED

Plaintiff's motion to amend his complaint to add new factual allegations and causes of action should be denied as it is (1) futile as the new claims do not relate back to the original complaint under Rule 15(c) and are barred by the statute of limitations; (2) the motion to amend was not timely filed; and (3) Defendants will be prejudiced by such a late amendment if it is allowed. Therefore, Defendants respectfully request the Court to deny the motion to amend the complaint.¹

II. FACTS

The incident at issue in this lawsuit occurred on April 16, 2011. Plaintiff filed a

¹ Defendants do not object to allowing an amendment to correct the caption, delete John Doe from the lawsuit and delete the false arrest claim from the lawsuit.

1 claim for damages with the City of Tukwila on April 3, 2013. In his claim, Plaintiff alleged
2 a claim for damages resulting from the force applied to him during his arrest. *See,*
3 *Declaration of Eric Drever, p. 5.* He made no mention of a claim for malicious prosecution
4 or negligent hiring of Officer Hogan.

5 Plaintiff filed his complaint in state court a year later on April 16, 2014, the last day
6 before the statute of limitations expired. Defendants subsequently removed this case to
7 U.S. District Court. Plaintiff alleged the following causes of action in his complaint: (1)
8 violations of the Fourth and Fourteenth Amendments against Defendant Hogan and Doe;
9 (2) violation of the Fourth and Fourteenth Amendments, failure to adequately supervise and
10 train Tukwila Police Department Officers, against Defendants City of Tukwila and former
11 Chief of Police David Haynes; (3) negligent supervision and retention under state law
12 against the City and Haynes; (4) respondeat superior; and (5) false arrest. Plaintiff did not
13 allege a claim of malicious prosecution or negligent hiring under either federal or state law.

14 Pursuant to the Court's order at Docket # 11, the deadline for amending the
15 pleadings was April 8, 2015. Plaintiff has not moved for relief from this deadline.

16 The deadline for submitting expert witness reports was also on April 8, 2015.
17 Plaintiff produced a report dated March 26, 2015 in which his expert gave opinions on the
18 alleged negligent hiring and malicious prosecution by Defendants, thus he was
19 contemplating these amendments well before the deadline to amend had passed. *See,*
20 *Declaration of Shannon Ragonesi, p. 3-4.* However, Plaintiff did not bring his motion to
21 amend until over two months later.

22 III. EVIDENCE RELIED UPON

- 23 1. Declaration of Eric Drever with attached exhibits.
- 24 2. Plaintiff's complaint.
- 25 3. Declaration of Shannon Ragonesi with attached exhibit.
- 26

IV. LEGAL AUTHORITY AND ANALYSIS

The decision of whether to grant leave to amend remains within the discretion of the district court, which may deny leave to amend due to “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment.” *Leadsinger, Inc. v. BMG Music Publ’g*, 512 F.3d 522, 532 (9th Cir. 2008), citing *Foman v. Davis*, 371 U.S. 178, 182 (1962). In *Leadsinger*, the court held the proposed amendment would be futile, and affirmed the district court’s dismissal on that basis.

A. PLAINTIFFS’ PROPOSED AMENDMENT TO THE COMPLAINT IS FUTILE AS HIS NEW CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS.

1. Plaintiffs’ proposed amendment will not relate back to the date the first complaint was filed pursuant to Rule 15(c).

Federal Rule of Civil Procedure 15(c)(1)(B) states that an amendment to a pleading relates back to the date of the original pleading when the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out or attempted to be set out in the original pleading. Claims arise out of the same conduct, transaction, or occurrence if they “share a common core of operative facts” such that the plaintiff will rely on the same evidence to prove each claim. *Williams v. Boeing Co.*, 517 F.3d 1120, 1133, (9th Cir. Wash. 2008), citing *Martell v. Trilogy Ltd.*, 872 F.2d 322, 325-26 (9th Cir. 1989) (finding an amended complaint related back where the amended complaint added a new theory of recovery based on facts alleged in original complaint). The requirement that the allegations in the amended complaint arise from the same conduct, transaction, or

1 occurrence is meant to ensure that the original pleading provided adequate notice of the
2 claims raised in the amended pleading. *Martell*, 872 F.2d at 326.

3 In *Williams*, the plaintiffs' original complaint alleged they were discriminated
4 against with regard to their "terms of employment" on the basis of race. They subsequently
5 filed a second amended complaint and alleged for the first time a claim for racial
6 discrimination in compensation for salaried employees. The Ninth Circuit held the
7 plaintiffs' general allegations that they were discriminated against with regard to "terms of
8 employment" did not provide fair notice of the compensation discrimination claim.
9 *Williams*, 517 F.3d at 1131. The court further held the specific references to pay in the
10 original and first amended complaints did not provide notice of a compensation claim
11 either. *Id.* The complaints had explicitly referred to plaintiffs having been denied
12 promotions due to their race. *Id.* However, they did not make any general or specific
13 allegations of salary inequities apart from promotion-related differences. Such factual
14 averments were not sufficient to allege a separate claim for compensation discrimination.
15
16
17 *Id.*

18 The court held there was no common core of operative facts between the
19 compensation discrimination claim and the promotion discrimination, hostile work
20 environment, and retaliation claims. *Williams*, 517 F.3d at 1133. The second amended
21 complaint had to include additional facts to support the compensation discrimination claim.
22 *Id.* **"The compensation discrimination claim is a new legal theory depending on**
23 **different facts, not a new legal theory depending on the same facts. It does not relate**
24 **back under Rule 15(c)."** *Id.*, (emphasis added).
25
26
27

1 The result in the present case is the same as in *Williams*. Plaintiffs' original
2 complaint did not contain the factual assertions they need to support their new claims of
3 malicious prosecution or negligent hiring.

4 To support his new claim of negligent hiring, Plaintiff was required to add 26 new
5 paragraphs of factual allegations (§§ 34-57, 79, 83) in the proposed amended complaint in
6 order to establish the elements of this claim. This includes but is not limited to brand new
7 allegations that the City knew or should have known of Hogan's unfitness to serve as an
8 officer at the time it hired him in January 2009; that the hiring of Hogan was a proximate
9 cause of Plaintiff's injuries; and that the background investigation of Hogan was
10 inadequate.
11

12 Plaintiff was required to add numerous new allegations to establish the elements of
13 his new malicious prosecution claim (§§ 29, 58-59, 91) including but not limited to
14 allegations that Hogan instituted and/or continued a prosecution against Turner; there was
15 no probable cause to support the charges against Plaintiff; the criminal proceedings
16 terminated on the merits in favor of Plaintiff; and that Plaintiff suffered injury or damage
17 because of the institution or continuation of the criminal proceedings.
18

19 Plaintiff's *original* claims arose out of the Tukwila police response on April 16,
20 2011 to 911 calls of "shots fired" near a house party where Plaintiff was ultimately arrested
21 and exposed to OC and Taser applications. This was the common core of operative facts
22 for the original complaint.
23

24 Plaintiff's *new* claims arise out of two completely different sets of operative facts.
25 With regard to the negligent hiring claim, the jury would have to go back to January 2009
26 when Hogan was hired to examine a completely different set of facts affecting the hiring
27

1 decision. With regard to the malicious prosecution claim, the jury will have to look
2 forward after the night of the party and arrest to determine whether the charges against
3 Plaintiff were continued to be prosecuted by the City of Tukwila with malice.² There is no
4 common core of operative facts between Plaintiff's original claims and his newly proposed
5 claims. Plaintiff must rely on substantial, new and additional facts that he has alleged in his
6 proposed amended complaint to prove these claims. As such, his new claims do not relate
7 back to the date the original complaint was filed.
8

9 **2. Plaintiff's new claims are barred by the three year statute of limitations.**

10 Defendant Hogan was hired by the Tukwila Police Department on January 26,
11 2009.³ Plaintiff did not file his lawsuit until April 16, 2014 – over five years later. The
12 statute of limitations for a negligent hiring claim is determined by the date of hire of the
13 employee.⁴ The limitations period is three years, and in this case, ended on January 26,
14 2012.⁵ Therefore, Plaintiff failed to file his negligent hiring claim within the three year
15 limitations period; and allowing him to amend his complaint to include this cause of action
16 would be futile.
17

18 Likewise, Plaintiff's malicious prosecution claim is also subject to a three year
19 statute of limitations under RCW 4.16.080(2).⁶ Not only did Plaintiff fail to file a claim for
20 damages with the City alleging malicious prosecution, which is a condition precedent to
21

22 ² Defendant notes that Plaintiff has still failed to sufficiently state a claim of malicious prosecution against the
23 City in his proposed amended complaint as he has not alleged that the City continued a prosecution against
him with malice as is required to establish this cause of action.

24 ³ *Drever Declaration*, p. 7.

25 ⁴ An employer's negligence in hiring occurs at the time of hiring. *Peck v. Siau*, 65 Wn. App. 285, 288, 827
P.2d 1108 (1992).

26 ⁵ RCW 4.16.080(2).

27 ⁶ Plaintiff concedes he did not bring a malicious prosecution claim in his original complaint. He merely
theorizes that it is similar to a false arrest claim and therefore he should be allowed to add it now even though
it is so late in the game. However, Plaintiff's failure to file his false arrest claim within the two year statute of
limitations required in Washington does not allow him to substitute in an entirely new claim.

1 The deadline to move to amend the complaint was April 8, 2015. Plaintiff did not
2 file his motion to amend until June 5, 2015, almost two months too late. Plaintiff has not
3 filed a motion to extend this deadline as required under Rule 6(b)(1)(B).

4 It is clear from the report produced by Plaintiff's police practices expert on March
5 26, 2015 that this expert was asked to review issues surrounding Defendant Hogan's hiring;
6 and was provided documentation such as the pre-employment background investigation for
7 his review. *See, Declaration of Shannon Ragonesi, pp.4.* Mr. Van Blaricom produced a
8 written report on March 26, 2015 stating it is his opinion that Hogan should not have been
9 hired, and indicating he had reviewed Hogan's pre-employment background investigation
10 in forming this opinion. *Id, at 3.*

12 Rule 6(b)(1)(B) only permits a court to extend the deadline for amending pleadings
13 for good cause and upon a showing of excusable neglect by Plaintiff. Nevertheless, despite
14 retaining his expert on February 20, 2015 per his report (*Id, at 3*), and apparently
15 contemplating negligent hiring as a possible cause of action, Plaintiff offers no explanation
16 for why he waited until after the April 8th deadline to file his motion to amend.⁹ The only
17 explanation offered by Plaintiff is that the attorney he recently retained in addition to
18 counsel Kirk Davis (not as a substitution) has "brought focus on different areas of the
19 claims." While this may be true, the record shows Plaintiff had contemplated adding this
20 claim before hiring his supplemental counsel but still did not move to amend in a timely
21 manner.
22

23
24 **C. DEFENDANTS WILL BE PREJUDICED BY A LATE ADDITION OF TWO
25 NEW CLAIMS TO THIS LAWSUIT.**

26 ⁹ Plaintiff maintains that this claim was already asserted in his original complaint, but the document speaks for
27 itself.

1 Plaintiff contends that Defendants are not prejudiced by adding two new causes of
2 action to this lawsuit less than two weeks prior to the discovery deadline. Adding new
3 claims so late in the litigation denies Defendants the opportunity to seek written discovery
4 from Plaintiff to better understand his theories and proof for these claims; to add pertinent
5 witnesses to the witness list to address these claims at trial; to consult with experts
6 regarding police hiring practices and/or prosecutorial practices in order to identify expert
7 witnesses on these claims for trial; or conduct any other additional discovery that might be
8 needed. Defendants respectfully disagree with Plaintiff's opinions on the issue of whether
9 they will be prejudiced if his motion is granted.
10

11 V. CONCLUSION

12 For the foregoing reasons, Defendants respectfully request the Court to deny
13 Plaintiff's motion to amend his complaint.
14

15 DATED: June 22, 2015

16 KEATING, BUCKLIN & McCORMACK,
17 INC., P.S.

18
19 By: /s/ Shannon M. Ragonesi

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on June 22, 2015, I electronically filed the foregoing with the
3 Clerk of the Court using the CM/ECF system which will send notification of such filing to
4 the following:

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1 DATED: June 22, 2015

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